FREEDOM OF SPEECH ON COLLEGE CAMPUSES

Buckley v. Meng
280 N.Y.S.2d 924 (1962)

Mr. William Buckley, the editor of *National Review*, sponsored a lecture in the auditorium of Hunter College, a municipal college of the City of New York. The talk urged people to support the movement to keep Algeria French. Some of those opposed to this view picketed the meeting. Afterwards, Mr. Buckley was informed by officials of the college that he would no longer be permitted to use the campus facilities. The restriction was based on the college policy of prohibiting programs which were not compatible with the aims of Hunter College as an institute of higher learning.[1]

The New York Supreme Court held that the regulations governing the use of the college facilities were either unconstitutionally vague or else they involved a denial of equal protection of the law to Mr. Buckley. In either case, they were invalid and the college was ordered to enact new regulations with all due speed.[2]

Ordinarily, the "void for vagueness" doctrine is applied in cases involving conviction under a criminal statute.[3] In such a situation the court is concerned that the defendant did not have fair warning that his conduct was prohibited. Even though the state may have authority to prohibit certain activity, to comply with procedural due process it must give notice of what is forbidden in order that a person can conform to what is required.

> It will not do to hold an average man to the peril of an indictment for the unwise exercise of his . . . knowledge involving so many factors of varying effect that neither the person to decide in advance, nor the jury to try him after the fact, can safely and certainly judge the result.[4]

---

[1] Buckley v. Meng, 230 N.Y.S.2d 924, 927-28 (Sup. Ct. 1962). *National Review* and its predecessor had sponsored an annual series of lectures at Hunter College since 1954. After the 1960 lecture, the Dean of Administration wrote Mr. Buckley and asked him for a copy of his introductory remarks at the meeting. In a letter of January 12, 1961, the Dean wrote Mr. Buckley informing him he could no longer lease the Hunter auditorium, since he felt the *Review* was "a political group presenting a distinct point of view of its own."

In April 1961 the President of the College wrote Mr. Buckley saying: "These halls are not available for political or other public movements or groups in presenting a distinct position or point of view opposed by substantial parts of the public."

In June 1961 the Administrative Committee of the College issued a statement of policy concerning the use of its facilities.

The court ignored the fact that the regulation on which the College based its denial was published after the denial was made (at 930, note 1).

[2] *Id.* at 935.

[3] See, *e.g.*, Lanzetta v. New Jersey, 306 U.S. 451 (1958); Herndon v. Lowry, 301 U.S. 242 (1937).

[4] Cline v. Frink Dairy Co., 274 U.S. 445, 465 (1927).

In this case Mr. Buckley was not in danger of being prosecuted for conduct which he might reasonably believe permissible. He was specifically informed that he was no longer permitted to use the facilities of Hunter College. However, lack of warning is not the only vice in an indefinite standard and the court has struck down regulations where lack of notice was not involved.[5]

The standard "compatible with the aims of Hunter College" was so broad that a reviewing court could rarely find an abuse of discretion.[6] Where freedom of speech is involved, a licensing requirement will not be upheld unless the standards governing the issuance of the license are so clear that they preclude arbitrary action.[7]

An indefinite standard causes unnecessary work for the courts. If the administrator has authority to make unconstitutional restrictions, litigation will result which could have been avoided. In addition, the court, in order to avoid an unconstitutional application of the regulation, would have to define its limits by a case by case method.[8]

The legislature is better equipped to determine which conduct shall be permitted and the judiciary should oppose any attempted delegation of such authority to it.

Allowing the college administrators discretion in prohibiting speakers on the campus runs contrary to the notion that in this country the people are governed by laws and not by men.[9] Due process requires the adjudication of an individual's rights and duties to be governed by rules sufficiently definite to guard against an arbitrary result.[10] A rule of law is particularly desirable where, as here, the decision-maker is insulated from public reaction. If regulations are made by a politically responsible body the people can attempt to redress any denial of freedom by exercising their right to vote.[11] However, the public has little or no control over the actions of college officials.

In cases where socially desirable conduct, such as freedom of expression, is involved there is an additional consideration. The very existence of the

---

[5] Gelling v. Texas, 343 U.S. 960 (1952); Burstyne v. Wilson, 343 U.S. 495 (1952); Kunz v. New York, 340 U.S. 290 (1951).

[6] Buckley v. Meng, *supra* note 1, at 930.

[7] Niemotko v. Maryland, 340 U.S. 267 (1951); Kunz v. New York, 340 U.S. 290 (1951); Saia v. New York, 334 U.S. 558 (1948); Largent v. Texas, 318 U.S. 418 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Hague v. C.I.O., 307 U.S. 496 (1939).

[8] "The Void for Vagueness Doctrine," 109 U. Pa. L. Rev. 67, 80-81 (1960).

[9] See Dicey, The Law of the Constitution, 202 (1959).

[10] "The vice to be guarded against is arbitrary action by officials. The fact that in a particular instance an action appears not arbitrary does not save the validity of the authority under which the action was taken." Frankfurter, J., concurring in Niemotko v. Maryland, *supra* note 7, at 385.

[11] This ensures that the rights of the majority will be protected. It still may fall upon the courts to protect the rights of the minority. See Danskin v. San Diego Unified School District, 28 Cal. 2d 536, 171 P.2d 885 (1946).

regulation, plus the method in which it was applied in Mr. Buckley's case,[12] would have an inhibiting effect on the dissemination of ideas.[13] Persons who desired to use the facilities in the future would tend to avoid discussion of any controversial subject while on the campus. Speakers who wished to espouse a theory which was not in harmony with the views of the majority would be faced with the threat of being banned in the future.

The alternative holding, that, as applied in this case, the regulations denied Mr. Buckley the equal protection of the law, is made clear by other programs which the college found permissible. A celebration of the independence of new African nations and a commemoration of the political revolt in Hungary were both sanctioned. To hold that these were compatible with the aims of Hunter College and that a speech on keeping Algeria French is not, suggests that the distinction either had no rational basis, or was based on the personal bias of the administrator. In either event it is unconstitutional.[14]

Assuming that the reason behind the refusal to let Mr. Buckley use the facilities was to prevent a possible breach of peace, the result seems obvious. Where the possibility of disorder results from the action of those who are opposed to the views presented in an attempt to silence the speaker, the state has a duty to protect the speaker to the fullest extent possible.[15] They should not let the mob control what is to be said.[16] On the other hand, if the speaker attempts to arouse a sympathetic audience to action[17] or engages in language deliberately insulting and inciting, so-called "fighting words,"[18] the police not only may, but should, stop him before harm is done. There is nothing which indicates that speakers sponsored by Mr. Buckley would be involved in either of these latter two forms of conduct.

Another possible reason for the regulations might be to uphold the "good name or the academic prestige of the college."[19] Although in some

---

[12] See note 1 *supra*. The Dean requested a copy of Mr. Buckley's introductory remarks. After reading them he determined that Mr. Buckley should not be permitted to use the College facilities again.

[13] *Cf.* Smith v. California, 361 U.S. 147 (1959).

[14] 16A, C.J.S. *Constitutional Law* § 505 (1956). "Legislation must not make any arbitrary or unreasonable distinctions." *Cf.* Cooper v. Aaron, 358 U.S. 1 (1958); Sweatt v. Painter, 339 U.S. 629 (1950). Van Alstyne, "Political Speakers at State Universities," 3 U. Pa. L. Rev. 328, 337-9 (1963).

[15] Gellhorn, American Rights, 61 (1960); Terminello v. Chicago, 337 U.S. 1 (1949); Rockwell v. Morris, 211 N.Y.S.2d 25 (Sup. Ct. 1961). "[I]f the speaker incites others to immediate unlawful action he may be punished . . . but this is not to be confused with unlawful action from others who seek unlawfully to suppress or punish the speaker."

[16] "The constitutional rights of the Respondents are not to be sacrificed or yielded to the violence and disorder which has followed upon the actions of the Governor and Legislature." Cooper v. Aaron, *supra* note 14, at 14.

[17] Feiner v. New York, 340 U.S. 315 (1951).

[18] Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[19] The statement of policy, *supra* note 1, made this one of the criteria. The vice of vagueness would also be present here.

circumstances this may be a proper reason for regulation,[20] it seems doubtful that it is sufficiently important to warrant suppression of free discussion. A restriction on speech will be struck down unless it is imposed for some substantial public purpose.[21] In other cases the court has refused to uphold limitations on first amendment freedoms designed to protect private property,[22] prevent littering of the streets,[23] protect the peace and quiet of households,[24] and to instill patriotism in school children.[25]

An argument which was not made[26] was that the school had the authority to bar Mr. Buckley under the doctrine of *in loco parentis*.[27] Under this theory the college stands in the place of the parent while the child is away at school.[28] If the parents had a chance to make their wishes known to the school,[29] so that the school authorities could follow their wishes in granting or denying permission to attend events, this argument would seem much stronger.[30] It seems doubtful, however, that the authority could be exercised over the students who were married or over twenty-one, since the parents themselves would have no control over them. Even if the regulation were properly phrased and limited, it might be found invalid on the ground that the same ends could be achieved by less restrictive measures.[31] The speaker could be allowed on campus with student attendance limited to those

---

20 Tanton v. McKinney, 226 Mich. 245, 197 N.W. 510 (1924) (Expulsion of female student from a state teacher's college was upheld.)

21 Note "Legislative Inquiry into Political Activity," 65 Yale L.J. 1159, 1173 (1956).

22 Marsh v. Alabama, 326 U.S. 501 (1946).

23 Lovell v. Griffin, 303 U.S. 444 (1937).

24 Martin v. Struthers, 319 U.S. 141 (1943).

25 West Virginia State Bd. of Educ. v. Barnett, 319 U.S. 624 (1943).

26 And possibly could not have been made since there is nothing to show that students were invited or even permitted to attend the meeting.

27 *But see* Van Alstyne, "Procedural Due Process and State University Students," 10 U.C.L.A.L. Rev. 368, 376 (1963). "The common assertion that the University's extraordinary power is one entrusted to it by the parents of its students is utterly unsubstantiated and probably untrue. Certainly it is difficult to imagine that parents either demand or expect that metropolitan state universities, with their large student bodies of ten thousand, twenty thousand and more, the majority of whom reside off campus, should stand in the place of the parents and closely supervise their children."

28 This would be in addition and supplementary to the interest of the state in protecting the children. See Prince v. Massachusetts, 321 U.S. 158 (1944), which upheld a statute which said no boy under twelve or girl under eighteen should sell periodicals on the street.

29 For example, by filling out a form to be returned with the student's schedule cards, indicating whether their child was permitted to attend: extra-curricular talks on all matters; talks on those matters concerning their academic field; . . . no extra-curricular talks.

30 *But see*, Christian v. Jones, 211 Ala. 161, 100 So. 99 (1924), which upheld expulsion of a pupil who left school during school hours, with the permission of her mother, to take a music lesson from a private teacher.

31 Frantz, "The First Amendment in the Balance," 71 Yale L.J. 1524, 1449, n.105 (1962).

having permission of their parents and those who are no longer under parental authority.

Despite petitioner's reputation, the decision in *Buckley*, standing alone, does not seem worthy of special attention. The fact that the action of an administrative official of a public school may be considered the action of the state[32] or that freedom of speech is to be protected against state[33] as well as federal action is no longer open to question. There was no "captive audience" present and thus no problem about a person's right not to listen[34] and the case did involve a "prior restraint," which is much less apt to be upheld than a post-speech punishment.[35] The interests of the college deemed to require the regulations seem clearly insufficient in view of prior holdings.[36]

The fact that the restricted speech was to occur on a college campus, rather than on a public street or in a public park, may be relevant,[37] but where the facilities have been opened to the public any principle of selection must have a rational basis, or run afoul of the equal protection clause.[38]

Although the impact at being denied the opportunity to speak on campus is not as great as that which would occur if he were prevented from speaking in a city,[39] the type of person refused would probably have an equally difficult time obtaining private facilities for his talk.[40] Regulation of speech will not ordinarily be upheld unless there is some reasonable alternative means of reaching the public with all points of view.[41]

The holding in *Buckley* may be significant, however, in light of a more recent decision by the New York Supreme Court. That court in *Egan v. Moore*[42] enjoined the University of Buffalo from permitting Herbert Aptheker, a ranking member of the Communist party, to speak on campus. The

---

32 Brown v. Bd. of Educ., 347 U.S. 438 (1954); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

33 Gitlow v. New York, 268 U.S. 652, 666 (1925). See also cases cited notes 7, 17-18, *supra*.

34 Kovacs v. Cooper, 336 U.S. 77 (1949).

35 Annot., 95 L. Ed 1196 (1951). "As regards freedom from censorship the scope of the constitutional protection is greater than as regards freedom from punishment."

36 See Meiklejohn, "Free Speech," 65 (1948). "As interests the integrity of public discussion and care for the public safety are identical." For an answer to the notion of Meiklejohn and Mr. Justice Black that freedom of speech is an absolute freedom see Hook, The Paradoxes of Freedom, 13-16 (1962).

37 Hague v. C.I.O., *supra* note 7, at 515. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and from time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." No like statement could be made of school auditoriums.

38 See Van Alstyne, *supra* note 14, at 388-89.

39 See Marsh v. Alabama, *supra* note 22.

40 Owners of private facilities would face a threat of economic boycott if the views were too distasteful to the majority. It is doubtful, however, that this is true in Mr. Buckley's case.

41 Frantz, *supra* note 31; Thornhill v. Alabama, 310 U.S. 88 (1940).

42 235 N.Y.S.2d 995 (Sup. Ct. 1962).

decision was reached after looking at New York legislation and at judicial decisions of New York and the United States Supreme Court concerning the Communist party.[43] The court held that the board of trustees of a state university had to conform its policy to the public policy of the state, which in New York was firmly opposed to Communists.

Assuming that the case would be upheld on appeal,[44] New York appears to distinguish between speakers belonging to the Communist party and speakers for other controversial minority groups.[45] Such a classification could be justified by the language of many Supreme Court decisions. Mr. Justice Jackson, speaking of the "clear and present danger" test, said:

> I would save it, unmodified, for application, as a "rule of reason," in the kind of case for which it was designed. When the issue is criminality of a hot-headed speech on a street corner, or circulating of a few incendiary pamphlets, or parading by zealots behind a red flag, or refusal of a handful of school children to salute our flag, it is not beyond the capacity of the judicial process to gather, comprehend and weigh the necessary materials for decision whether it is a clear and present danger of substantive evil or a harmless letting off of steam. It is not a prophecy, for the danger in such cases has matured by the time of trial or it was never present. . . . But its recent expansion has extended, in particular to Communists, unprecedented immunities. Unless we are to hold our government captive in a judge-made verbal trap, we must approach the problem of a well organized nation-wide conspiracy, . . . as realistically as our predecessors faced the trivialities that were being prosecuted until they were checked with a rule of reason.[46]

It has been argued that an inherent limitation in a democracy is that the process of majority rule is not subject to majority decision, i.e., that the majority may not vote to do away with a democracy.[47] If this notion is accepted, it would seem to warrant the silencing of any group which proposed to replace democracy with another form of government. There would be no need for a well-informed public on this issue, the *raison d'etre* for freedom of speech, since such a situation is not within the area of popular choice.

To hold that the majority could decide to do away with majority decisions seems to be almost a contradiction of terms,[48] and the idea of the

---

[43] *Id.* at 999.

[44] There is some doubt that it would. De Jonge v. Oregon, 299 U.S. 353 (1937), appears to be controlling since the court did not even consider the subject matter of the talk.

[45] See also Rockwell v. Morris, *supra* note 15.

[46] Dennis v. United States, 341 U.S. 494, 567 (1951) (concurring opinion). See also Barenblatt v. United States, 360 U.S. 109, 126 (1959).

[47] Van den Haag & Ross, The Fabric of Society, 62 (1958), quoted in Hook, *op. cit. supra* note 36, at 132-34.

[48] *But see* Gitlow v. New York, 268 U.S. 632, at 673 (1924) (Holmes, C.J., dissenting). "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominating forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

majority giving away the freedom of unborn persons as well as those of the minority seems shocking.[49] However, there is nothing inherent in the meaning of a democracy[50] that precludes the people from choosing a different form of government. The possible results may be a reason for criticism of a democracy as being inadequate to safeguard human freedom, but not a reason for saying that a democratic system obligates future generations to preserve it.[51]

It is now accepted that the Communist party is significantly different from other types of heresy.[52] The Communists act in a secretive manner, placing men in key positions of trust and power instead of relying solely on arguing in the public forum.[53] They are therefore not as susceptible to the ordinary corrective of public discussion.[54] The test propounded by Learned Hand[55] and approved by Mr. Chief Justice Vinson, speaking for the majority, in *Dennis v. United States*,[56] "the gravity of evil discounted by its improbability," is designed to provide for this distinction. According to this test the fact that there is no showing of immediacy of harm would no preclude suppression. Words which create a probability of serious danger to occur in the future could be punished. If the threatened evil was something as serious as the overthrow of our government by violence, the probability of its occurrence necessary to justify its proscription would not need to be great.[57]

Communists have been made subject to restrictions that do not apply to other Americans.[58] They may be required to disclose their membership[59]

---

[49] An argument, based on the language of the 9th and 10th Amendments, might be made that rights reserved to the people and possessed by neither the federal or state government (See Redlich, "Rights Retained by the People," 37 N.Y.U.L. Rev. 787, 805-07, 1962) could not be taken away from them by majority vote.

[50] Webster's Third New International Dictionary (1959) defines democracy as: "a government by the people: rule of the majority."

[51] Hook, *op. cit. supra* note 36, at 136.

[52] Dennis v. United States, 183 F.2d 201, 212-13 (1950). "The American Communist Party is a highly articulated, well contrived organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. . . . The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means. . . . The question before us, and the only one, is how long a government, having discovered such a conspiracy, must wait."

[53] Schmandt, "The Clear and Present Danger Doctrine," 1 St. Louis L.J. 265, 270-71 (1951).

[54] "If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 357 (1927) (concurring).

[55] Dennis v. United States, *supra* note 52, at 212.

[56] 341 U.S. 494 (1951).

[57] Schmandt, *supra* note 52.

[58] But see In re Summers, 325 U.S. 561 (1945), a conscientious objector was refused admission to the practice of law in Illinois; and Clark v. Deckebach, 274 U.S. 392 (1927), where a city ordinance was upheld which prohibited the issuance of a license to aliens to operate pool rooms.

[59] Wilkenson v. United States, 365 U.S. 399 (1960); Braden v. United States, 365

or the names of others with whom they associate,[60] while those in other organizations may not.[61] A Communist may be prohibited from being a union official[62] or a teacher in the public school system.[63] He may not be able to obtain a place on the ballot[64] or to work for the state or any of its political subdivisions.[65]

It does not follow from this that Communists in America have no rights, or that *Egan v. Moore* was correctly decided. The above situations may be distinguished from *Egan* by weighing the interests involved. The probability of harm arising from a subversive being in a position where he could order strikes or from having a Communist agent teaching in the classroom every day is much greater than the danger from a one-shot speaking appearance on a college campus.

In cases where a person was punished for failure to answer questions asked by a congressional committee, the refusal to answer hindered the committee in obtaining facts for possible legislation. In investigating communist infiltration in Southern industry[66] or in education[67] it would seem a proper subject of inquiry as to whether persons involved in these areas were Communists. Even so had the person questioned chosen to invoke the fifth amendment as a basis for his refusal to answer, he would have been protected; instead the refusal was based on first amendment grounds. In view of this possible means of escape, the impact of being asked such questions would not seem to outweigh the governmental interest in obtaining relevant factual bases for future legislation.

The prohibition against working for the government, even in positions where no security breach is possible, could be explained on the basis of a conflict of interest.[68] One of the communist aims is replacement of the existing form of government. Since anything that would strengthen the established form of government would make its replacement more difficult, his work in carrying out the aims of his government employer would conflict with his work as a party member.

There must be some causal connection between the activity prohibited

---

U.S. 431 (1960); Barenblatt v. United States, 360 U.S. 109 (1959). See also In re Anastaplo, 366 U.S. 82 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961).

60 Uphaus v. Wyman, 360 U.S. 72 (1959).

61 N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).

62 By denying the benefits conferred by the Management Labor Relations Act to Unions whose officers are affiliated with the Communist Party. American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

63 Adler v. Bd. of Educ., 342 U.S. 485 (1952).

64 Gerande v. Election Bd., 341 U.S. 56 (1951). See also U.S. Constitution art. 2 § 1 and art. 6, requiring members of Congress, members of the state legislatures, and all executive and judicial officers, both of the United States and the states, to take an oath to support the Constitution.

65 Garner v. Los Angeles Bd., 341 U.S. 716 (1951).

66 Wilkenson v. United States and Braden v. United States, *supra* note 59.

67 Barenblatt v. United States, *supra* note 59.

68 See Hook, Political Power and Personal Freedom, 271-74 (1959).

and the evil which the government is attempting to avoid.[69] Since the *Egan* case ignores the topic of Mr. Aptheker's talk, it apparently holds that no member of the Communist party may make a speech on the campus of a state university.[70] It may be that the Communists are so ingenious that they are able to use an appearance and talk on any subject to further their illegal ends.[71] In the absence of such a finding, however, the situation seems indistinguishable from that in *Buckley*.

[69] De Jonge v. Oregon, *supra* note 44.

[70] See Van Alstyne, *supra* note 27, at 335-36.

[71] See Hook, *op. cit. supra* note 68, at 300.